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No. 10-386

Supreme Court, U.S.
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In The

Supreme Court of the United States

JAMES DUNN,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court For The State Of Louisiana

BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTION PRESENTED

Considering Supreme Court Rule 10's requirements that a writ of certiorari issue only for important federal questions or conflicts in state court's versus federal court's interpretations of important federal questions, is a factual determination of whether a trial court properly considered a *Batson/McCollum* objection pursuant to *Batson*'s three-step analysis an issue of constitutional magnitude sufficient to invoke this Honorable Court's discretionary review?

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STATEMENT OF THE CASE

On June 22, 1998, petitioner, James Dunn, was indicted by the grand jury for the Parish of Assumption, State of Louisiana, with two counts of First Degree Murder for the June 4, 1998, killings of Lisa Ann Dupuis and Jacqueline Guillot Blanchard in violation of LSA-R.S. 14:30. Petitioner was arraigned on July 14, 1998, pleading not guilty to the charges. Thereafter on August 24, 1998, petitioner changed his plea to not guilty and not guilty by reason of insanity. Subsequently, all appropriate pre-trial motions were set and heard. On February 1, 1999, petitioner withdrew his former plea of not guilty and not guilty by reason of insanity, re-entering his plea of not guilty to the charges.

After hearing petitioner's motion for a change of venue, the trial court granted same, transferring the matter to Calcasieu Parish for jury selection only with trial to be held in Assumption Parish. On March 8, 1999, jury selection commenced. Upon completion of jury selection, trial began on March 15, 1999. After trial by jury, petitioner was found guilty as charged on March 18, 1999, the trial court thereafter proceeding to the penalty phase of trial. After presentation of all evidence, the jury unanimously determined that petitioner should be sentenced to death. The trial court thereafter ordered that a Pre-Sentence Investigation Report and Uniform Capital Sentence Report be completed. Upon receipt thereof, the trial court set petitioner's sentencing for June 17, 1999. On that date prior to sentencing, the trial court

denied petitioner's previously filed motion for a new trial and sentenced petitioner to death for the murders of Lisa Ann Dupuis and Jacqueline Guillot Blanchard.

In his December, 21, 2001, direct appeal to the Louisiana Supreme Court, petitioner urged six assignments of error, one of which was that the death penalty was not appropriate in this instance based on this Honorable Court's holding in *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), as he is mentally retarded. In response to the State of Louisiana's July 8, 2002, reply brief, petitioner filed two supplemental briefs and a brief in response to the State's original brief. After oral argument, the Louisiana Supreme Court requested post-oral argument memorandums be filed addressing the issue of petitioner's mental retardation claim. Subsequently, the Louisiana Supreme Court rendered judgment on November 1, 2002, affirming petitioner's conviction and remanding the matter back to the trial court for consideration of defendant's mental retardation claim. *State v. Dunn*, 01-1635 (La. 11/1/02), 831 So. 2d 862. Petitioner thereafter filed a motion on March 3, 2003, to appoint experts and set an *Atkins* hearing or, in the alternative, notice of intent to seek writs of mandamus, and requested a return date. On March 6, 2003, the State filed its memorandum in opposition to petitioner's request for a post-trial *Atkins* hearing. Said motion was heard on March 20, 2003, after which the trial court ruled that petitioner had not met his threshold requirement. Petitioner then filed a

request for writ of mandamus to the Louisiana Supreme Court, seeking review of the trial court's denial of an *Atkins* hearing to which the State responded on May 5, 2003. *State v. James Dunn*, No. 03/KP/0821. In response thereto, the Louisiana Supreme Court issued an order, directing the trial court to conduct an *Atkins* hearing pursuant to those procedures set forth in *State v. Williams*, 01-1650 (La. 11/1/02), 831 So. 2d 835. Subsequently, a hearing was set for that matter for April 24-27, 2007.

On April 2, 2007, petitioner filed a motion seeking to require that the *Atkins* hearing be heard by a jury, alleging therein that pursuant to LSA-C.Cr.P. art. 905.5.1 and constitutionally, he was entitled to a jury determination of his mental retardation claim and/or a new sentencing hearing. In response thereto, respondent herein filed a motion in opposition on April 20, 2007. On April 24, 2007, a hearing on the motion was had after which the trial court ruled that pursuant to LSA-C.Cr.P. art. 905.5.1 as interpreted in *State v. Turner*, 05-2425 (La. 7/10/06), 936 So. 2d 89, petitioner was entitled to a jury trial on the issue of his mental retardation claim. From this ruling, the State of Louisiana sought review by writ of certiorari which the Louisiana Supreme Court granted on September 14, 2007. Subsequently, after briefing and oral argument, the Louisiana Supreme Court on January 25, 2008, found that petitioner was not entitled to a jury trial of his mental retardation claim. *State v. Dunn*, 2007-0878 (La. 1/25/08), 974 So. 2d 658. The trial court then set petitioner's *Atkins* hearing for

October 30-31, 2008. The hearing was subsequently heard on those dates and continued to November 12, 2008, and November 24, 2008, for additional testimony. After hearing, the trial court took the matter under advisement. On February 9, 2009, the trial court ruled that petitioner was not mentally retarded. Petitioner then timely filed a Motion for Appeal and Designation of the Record. On direct appeal of the trial court's February 9, 2009, judgment, petitioner's sole assignment of error was that the trial court erred in finding him not mentally retarded. After oral argument, the Louisiana Supreme Court on October 15, 2009, rendered judgment affirming the trial court's finding that petitioner was not mentally retarded and affirmed petitioner's death sentence. Petitioner's subsequent motion for rehearing was denied on June 25, 2010. Petitioner now seeks relief herein by way of writs of certiorari from the Louisiana Supreme Court's judgment finding him guilty based on his skewed view of the facts involving Juror Anderson. The State of Louisiana submits that petitioner's request for relief should be denied.

STATEMENT OF THE FACTS

On June 2, 1998, Barbara Stewart rented a green Pontiac Sunfire from AVIS Rent-A-Car for her sister, Leola Stewart, to drive. Leola Stewart was the girlfriend of petitioner, James Dunn. The vehicle was to be returned on June 3, 1998, at 3:00 o'clock p.m. However, prior to its return, Leola Stewart extended

the rental agreement for an additional day pursuant to a request by Barbara Stewart. On the morning of June 4, 2001, petitioner borrowed the vehicle from Barbara. He then picked up Kendall Breaux and Anthony Scott and drove to Iberville Bank, located on La. Hwy. 1 in Assumption Parish. The three had cased out the bank approximately two weeks prior to this date. After driving past the bank, they went to a convenience store where they purchased soft drinks. Shortly before noon they returned to the bank, pulling into a handicapped parking space just outside the front entrance of the bank.

At approximately 11:40 o'clock a.m., petitioner, wearing a baseball cap, and Anthony Scott entered the bank. A video tape surveillance camera captured images of the two men approach the counter of bank teller Lisa Dupuis whereupon a transaction took place. It appeared that Ms. Dupuis began filling out a money order. During the transaction, petitioner left the bank, leaving Scott behind inside the bank. Petitioner re-entered the bank a short time later, drawing a 9mm weapon on Ms. Dupuis. Simultaneously, Scott pulled a large revolver on Ms. Jackie Guillot Blanchard who was seated at a desk by the front door. Petitioner then jumped over the teller counter and grabbed Ms. Dupuis. Scott, aiming his weapon at Ms. Blanchard, told her to move behind the teller counter with Ms. Dupuis.

Petitioner and Scott removed money from the cash drawers while holding the women at gunpoint. Ms. Dupuis and Ms. Blanchard were then forced into

a side office to the left of the teller station where the video equipment was housed. Kendall Breaux subsequently entered the bank carrying a container filled with gasoline. He began pouring gasoline throughout the bank while Ms. Blanchard stood just inside the office door, hands folded in prayer. A 9mm gun was pointed at her. A bank customer, Ms. Earline Simoneaux, coming to do her banking, pulled up to the teller window and noticed that the teller blinds were drawn, but the slats were open. As she reached for the teller button, she heard two shots ring out and witnessed two men run from the bank. She then heard a third shot and saw a black male wearing a baseball cap run through the front door. As Ms. Simoneaux pulled her car around, she noticed a green Pontiac Sunfire leaving the parking lot. Ms. Simoneaux attempted to follow the car but once she saw police arrive at the bank, she pulled back into the bank parking lot. Assumption Parish Sheriff's Deputy Michael Brown, dispatched pursuant to a silent alarm, pulled into the bank parking lot just as the green Pontiac Sunfire was leaving. Upon approaching the bank's front door, he opened it and announced his presence. It was then that he smelled a strong odor of gasoline emitting from the bank. Deputy Brown then called out for the bank tellers, but heard no response. He did hear a gurgling sound coming from the side office. Upon entering the lobby and approaching the office, Deputy Brown saw Ms. Blanchard lying in a pool of blood gasping for breath. Upon seeing Ms. Dupuis' legs behind the teller counter, Deputy Brown ran outside the bank to use his

portable radio. After calling for back-up and an ambulance, Deputy Brown re-entered the bank where he noticed Ms. Blanchard attempting to breathe. He checked Ms. Dupuis and determined that she was dead.

Upon Acadian Ambulance's arrival on the scene, the EMS personnel attempted life-saving measures on Ms. Blanchard but she died enroute to the hospital. Ms. Dupuis was pronounced dead at the scene. Subsequent investigation revealed that both women had been shot multiple times in the head and upper body by a 9mm weapon. Bullets and empty casings which were later matched to Scott's and petitioner's weapons were recovered from under Ms. Dupuis' and Ms. Blanchard's bodies and in the office area. Unlit safety matches were located under their bodies as well as in the pools of blood in the office area. The bank's video equipment had been ripped out and was missing together with a total of $16,615.00 in cash. Based upon Ms. Simoneaux's and Deputy Brown's description of the vehicle, a BOLO (Be On the Look Out) was put out for the vehicle.

Roadblocks were immediately set up throughout Assumption Parish and neighboring communities. Shortly thereafter, two Ascension Parish deputies attempted to stop a vehicle fitting the description at a roadblock set up just inside the Ascension Parish line. However, the vehicle was driven through the roadblock at a high rate of speed and as it rounded a curve, encountered a train passing on the tracks perpendicular to the highway. The vehicle, driven by

petitioner, crashed head-on into the train. Uninjured, petitioner and Scott jumped out of the vehicle's front seats and fled on foot, escaping under a train trestle. As Breaux exited the back seat and attempted to run, he was captured. Petitioner and Scott were subsequently captured in a cane field approximately 2-3 miles away. All of the money, the video equipment, and both weapons were found, either in the vehicle or in the cane field where Scott and petitioner were hiding.

ARGUMENT

The Louisiana Supreme Court correctly considered and applied that test set out in *Batson* and its progeny, properly finding no trial court error in its juror selection determinations.

Supreme Court Rule 10 provides that the granting of a writ of certiorari is discretionary and that same will only be granted for compelling reasons. It then proceeds to list examples of issues that will be considered to include: (1) conflicts on federal law between federal courts of appeal, (2) conflicts of interpretation of federal law between the state courts of last resort, and (3) where an important question of federal law decided by either state courts or federal courts should be decided by this Honorable Court. The instant matter which seeks to challenge a factual determination of the trial court affirmed by the Supreme Court of Louisiana does not meet any of

those standards required under Supreme Court Rule 10. Petitioner's writ does not invoke either a conflict between federal circuits, between federal and state courts, nor present an issue of constitutional magnitude. As petitioner merely seeks to challenge a factual finding of the trial court, asserting that the trial court misapplied a properly stated rule of law, respondent would first assert that this issue is not an issue subject to this Honorable Court's granting of a writ of certiorari. See *United States v. Johnston*, 268 U.S. 220, 227 (1925); and *Texas v. Mead*, 465 U.S. 1041 (1984). However, in an abundance of caution and seeking judicial economy, respondent addresses petitioner's claim.

In his sole assignment of error, petitioner based on a variety of issues, claims that the trial court failed to properly analyze respondent's *Batson* objection pursuant to the well established test set forth in *Batson*. Specifically, he claims that the trial court eliminated the requirements of Step One and Step Three and unreasonably applied Step Two in finding that petitioner had discriminated against prospective juror Anderson in the jury selection process.

The Supreme Court in *Batson v. Kentucky* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) adopted a three step analysis in determining whether a defendant's constitutional rights have been infringed by impermissibly discriminatory practices. First, the Court required the defendant to make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. Second, if the

requisite showing had been made, the Court noted that the burden shifted to the prosecutor to articulate a race-neutral explanation for striking the jurors in question. However, this step does not demand an explanation that is persuasive or even plausible. *Purkett v. Elem*, 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 34 (1985). Finally, the Court required the trial court to determine whether the defendant had carried his burden of proving purposeful discrimination. *Hernandez v. New York*, 500 U.S. 352, 358-359, 115 S.Ct. 1859, 1866, 114 L.Ed.2d 395 (1991). In reaching such a decision, the trial court was required to examine all of the evidence available. Essentially, Step Three involves a comparison of the arguments and facts in support thereof posited in the challenger's prima facie offering with the "race-neutral" reasons articulated by the exceptor to determine whether the exceptor engaged in purposeful discrimination. This comparison must be made in light of the record with reviewing courts owing the trial court great deference in accessing the credibility of in-court testimony. *Batson v. Kentucky*, 476 U.S. at 98 n. 21, 106 S.Ct. at 1724 n. 21. The Supreme Court subsequently expanded *Batson*'s logic to include the State's *Batson* objection to a defendant's peremptory exceptions in *Georgia v. McCollum*, 505 U.S. 42, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992) (sometimes referred to as a reverse *Batson* objection).

For a *Batson* challenge to succeed, it is not enough that a racially discriminatory result be evident. Rather, the result "must ultimately be tracked

to a racially discriminatory purpose." *Batson v. Kentucky*, supra, 476 U.S. 94, 106 S.Ct. 1721, quoting *Washington v. Davis*, 426 U.S. 229, 240, 96 S.Ct. 2040, 2048, 48 L.Ed.2d 597 (1976). Thus, the sole focus of the *Batson* inquiry is upon the intent of the individual exercising the peremptory exception at the time he exercised same. Because the factual determination pertaining to purposeful discrimination rests largely on credibility evaluations, the trial court's findings are entitled to great deference by the reviewing court. *Batson v. Kentucky*, 476 U.S. at 98 n. 21, 106 S.Ct. at 1724 n. 21. On direct appeal, the credibility findings the trial court makes in a *Batson* inquiry are reviewed for clear error. *Hernandez v. New York*, 500 U.S. 352 364-366, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991).

STEP ONE

"The first step of the Batson analysis, requiring the showing of a prima facie case, is not meant to be onerous." See *Johnson v. California*, 545 U.S. 162, 170, 125 S.Ct. 2410, 162 L.Ed.2d 129 (2005). The objector need only produce "evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." *Johnson v. California*, 545 U.S. at 170, 125 S.Ct. 2410. In deciding whether a prima facie case of discrimination has been demonstrated, the trial court should take into account "all relevant circumstances." *Batson v. Kentucky*, 476 U.S. at 96, 106 S.Ct. 1712. To establish a prima facie reverse *Batson* case, the State: (1) must show that the

peremptorily struck panelist was a member of a cognizable racial group and that the defendant has exercised peremptory challenges to remove members of that group from the venire; (2) is entitled to rely on the fact "that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate'", and (3) (must show that these facts and circumstances raise an inference that the defendant exercised peremptory challenges on the basis of race. *Batson v. Kentucky*, 476 U.S. at 96, 106 S.Ct. 1712 (quoting *Avery v. Georgia*, 345 U.S. 559, 562, 73 S.Ct. 891, 97 L.Ed.2d 1244 (1953)). In *Johnson v. California*, 545 U.S. 162, 125 S.Ct. 2410, 162 L.Ed.2d 129 (2005), this Honorable Court stressed that Batson "spoke of methods by which prima facie cases could be proved in permissive terms." *Id.* at 169 n. 5, 125 S.Ct. 2410. "[A] prima facie case of discrimination can be made out by offering a wide variety of evidence, so long as the sum of the proffered facts gives 'rise to an inference of discriminatory purpose.'" *Johnson v. California*, 545 U.S. at 169, 125 S.Ct. at 2416 (quoting *Batson v. Kentucky*, 476 U.S. at 94, 106 S.Ct. at 1721). Prima facie cases can be made based on a statistical disparity alone. See *Williams v. Runnels*, 432 F.3d 1102 (9th Cir. 2006). While "[t]here is no magic number of challenged jurors" that automatically establishes a prima facie case of discrimination (*United States v. Chinchilla*, 874 F.2d 695, 698 (9th Cir. 1989), a disproportionate rate of strikes against a recognizable racial group can establish a pattern of exclusion of the basis of race that gives rise to a prima facie *Batson* violation (*Williams v. Woodford*, 384 F.3d 567,

583 (9th Cir. 2004). This disproportionate share of total peremptory strikes against members of a cognizable racial group compared to the percentage of that racial group in the venire is sometimes referred to as the "challenge rate". However, where one attempts to exclude a disproportionate number of members of a cognizable racial group from the venire by the use of peremptory strikes, same is referred to as the "exclusion rate". Likewise, questions and statements made during voir dire by either the prosecutor or defense counsel and in exercising his challenges may support or refute an inference of discriminatory purpose. These examples are merely illustrative. See *Batson v. Kentucky*, 476 U.S. 96, 106 S.Ct. 1712, 1723 (1986); and *Morrison v. Cain* ___ F.Supp.2d ___, 2007 WL 4114345 (E.D. La. 2007) (quoting *United States v. Nelson*, 450 F.3d 1201, 1207-08 (10th Cir. 2006) (citing *Miller-El v. Dretke*, 545 U.S. 231 (2005). A trial judge has broad latitude to consider the totality of the circumstances when determining whether the objector has raised an inference of discrimination. See *United States v. Diaz*, 176 F.3d 52 (2nd Cir.), cert. denied, 528 U.S. 875, 957, 120 S.Ct. 181, 314, 386 (1999); and *United States v. Stavroulakis*, 952 F.2d 686, 696 (2nd Cir.), cert. denied, 504 U.S. 926, 112 S.Ct. 1982 (1992).

Herein, petitioner contends that the trial court's "ad hoc rule" which required that where either party had exercised three or more peremptory strikes against jurors of a cognizable racial group, that party making the peremptory strike must give a race-neutral reason for its peremptory strike is a stretch of

the trial court's statements. A fair reading of the trial court's comments indicates that the trial court informed both parties that he would not entertain a *Batson* objection until at least three peremptory strikes had been made by either party of jurors of a cognizable racial group. The trial court did not eliminate the requirements of *Batson*'s Step One. It merely placed a threshold on the urging of a *Batson* objection. The trial court's "ad hoc rule" did not shift the burden to petitioner to prove that the strikes he exercised were not racially motivated. Respondent was still required to meet the requirements of Step One and Step Three. Respondent asserts that the record supports its assertions based on the following facts.

The record reflects that in Panel One, fourteen potential jurors were called. Of that group, there were thirteen whites and one African-American. Both parties stipulated that two potential jurors should be struck for cause. Petitioner also exercised two challenges for cause against white potential jurors which were granted by the trial court and two peremptory strikes of white potential jurors. Respondent exercised one peremptory strike of a white potential juror. Of the two potential jurors peremptorily struck by petitioner, one was done after his challenge for cause was denied. Three potential jurors were selected (two whites and one African-American). Subsequently, two selected jurors (one white and one African-American) were excused by the trial court for incompetence pursuant to LSA-C.Cr.P. art. 796.

In Panel Two, fourteen potential jurors were called. Of that group, there were eleven whites and three African-Americans. Both parties stipulated that four of those potential jurors should be excused for cause. Petitioner additionally exercised three challenges for cause of white potential jurors which were granted and one peremptory strike of a white potential juror after his challenge for cause was denied. Respondent struck two potential jurors, one white and one African-American after its challenge for cause was denied. One potential juror was accepted, an African-American. It was during Panel Two's voir dire that after petitioner broached the issue of *Batson*, the trial court confirmed that he required that at least three prospective jurors of a cognizable racial group would be required to be peremptorily struck before he would consider a *Batson* objection. At that point, respondent had only peremptorily struck one African-American juror and had accepted two African-American jurors, one of which was subsequently excused by the trial court as cited above.

Panel Three consisted of eleven whites and three African-Americans. Both parties stipulated that two potential jurors should be excused for cause. Petitioner additionally exercised one challenge for cause against a potential white juror which the trial court granted and peremptorily struck four potential white jurors, two after being denied his challenge for cause. Respondent struck no one. One white potential juror was accepted.

In Panel Four, ten whites and three African-Americans were called. Prior to respondent making its *Batson* objection, petitioner exercised an additional two peremptory strikes of potential white jurors for a total of nine peremptory strikes, all of whom were white. Petitioner's ninth strike against white potential juror, Mr. Anderson, was denied. Immediately after respondent made its *Batson* objection and prior to the trial court ruling or even requesting that respondent establish a prima facie case of discrimination, petitioner's counsel started providing his alleged race-neutral rationale for peremptorily striking those nine peremptory strikes already made. Counsel did not request that respondent establish a prima facie case of discrimination. Rather, counsel proceeded to give his race-neutral rationale for seven of the nine peremptory strikes, claiming that as to the first two peremptory strikes, he did not have his notes with him. The trial court after hearing same on those seven individuals and respondent's counter argument, found that petitioner had shown race-neutral rationale for peremptorily striking seven of the nine individuals. It held open to the following day its determination of the remaining two peremptory strikes. During the remaining voir dire of Panel Four, petitioner peremptorily struck Juror Anderson, the individual whom petitioner contends herein should have been peremptorily struck and not placed as a juror. The record reflects that upon respondent making its *Batson* challenge continuing, petitioner's counsel did not request again that respondent establish a prima facie case of discrimination as to

Anderson. Rather, petitioner's counsel immediately commenced to provide a race-neutral rationale for striking Anderson. The trial court after hearing both parties and considering the record, found that petitioner had failed to provide a valid race-neutral rationale upon which to strike Anderson and seated him as a juror. Respondent further peremptorily struck two white potential jurors in Panel Four. Three (two whites and one African-American) individuals were seated as jurors.

On the following day, prior to voir dire of Panel Five, the trial court after hearing petitioner's race-neutral rationale for the remaining two peremptorily struck jurors during Panel One's voir dire and respondent's arguments against same, found that petitioner had provided race-neutral rationale for the striking of those two potential white jurors. Panel Five prospective jurors consisted of eleven whites and three African-Americans. Both parties stipulated that two of the potential jurors should be excused for cause. Of the remaining twelve potential jurors, petitioner peremptorily struck two potential white jurors, both after his challenge for cause had been denied. Respondent peremptorily struck one African-American potential juror. Petitioner challenged two potential white jurors for cause which were granted by the trial court while respondent challenged five (three whites and two African-Americans). Two white potential jurors were accepted.

Panel Six consisted of twelve whites and two African-Americans. Both parties stipulated that five

potential jurors should be excused for cause. Petitioner additionally challenged three white potential jurors for cause which the trial court granted. While each petitioner and respondent peremptorily struck one prospective juror each (respondent – African-American; defendant – white), the trial court found that both parties had provided race-neutral rationale for striking each particular potential juror. Three potential jurors, all white, were seated. Respondent challenged one white potential juror for cause which the trial court granted. Finally, in Panel Seven, respondent and petitioner accepted the last juror (white) and stipulated to the three alternates.[1]

While petitioner urges in the instant writ that the trial court eliminated *Batson*'s Step One requirement of finding inferences of purposeful discrimination,

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[1] To summarize the jury selection process:

Panel	Potential Jurors After Cause	Potential White	Potential African-American	Petitioner Peremptory Challenges of White Jurors
1	4	4	0	2
2	4	2	2	1
3	5	5	0	4
4	7	6	1	3
5	5	4	1	2
6	5	4	1	all statutory challenges used
7	2	2	0	all statutory challenges used
TOTAL	32	27	5	12

replacing it with its "ad hoc rule", his argument instead complains that the trial court shifted the burden to petitioner to prove that his peremptory strikes of whites were not racially discriminatory. He seeks to support his argument by citing statistics. In reality, his argument seems to revolve around what he perceives as a statistical disproportionate number of potential white jurors in the jury pool. He consistently attempts to make his conviction the subject of a black/white issue as evidenced by the first sentence in his statement of the case, namely: "James Dunn, a black man, was sentenced to death by a jury of ten whites and two blacks." Citing that the jury venire was 82.5% white, petitioner seems to urge that the vast majority of potential jurors who he could have peremptorily struck would be white. In the instant case, petitioner's peremptory strikes were more than a vast majority, they were exclusively against whites. Only in one case did he agree to challenge an African-American for cause. While the record reflects that 84% of the potential jurors remaining after cause were white (see FN 1 – 27 of 32), petitioner's "challenge rate" of white potential jurors was 100%. The record further reflects that during voir dire, petitioner sought to solely inquire about white jurors' feelings as to African-Americans rather than seeking to determine whether any particular juror could ensure petitioner was accorded all of his constitutional rights during trial. He did not seek to inquire about race concerns with potential African-American jurors with the same intensity. The clear intent of petitioner's questioning was to create a

racial component to voir dire questioning. It clearly created an inference of discrimination against a cognizable racial group (whites). Respondent notes that the trial judge, who petitioner conveniently fails to acknowledge is of African-American descent, was acutely aware of petitioner's voir dire questioning's intent. Having surmised said intent, the trial court ruled appropriately as to *Batson*'s Step One.

However, assuming arguendo and without admitting that the record fails to support an inference of petitioner's racial discrimination, respondent further asserts as the Louisiana Supreme Court found, that petitioner can not now complain that the trial court failed to address *Batson*'s Step One (see *Hernandez v. New York*, 500 U.S. 352, 359 wherein the Court held that "[o]nce a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant has made a prima facie showing becomes moot."). The record reflects that when faced with addressing a *Batson* objection based on his peremptory strikes, petitioner failed to allow the trial court to consider same and did not request that the trial court require respondent to prove a prima facie case of discrimination. Rather, petitioner immediately commenced to provide his alleged race-neutral rationale for his peremptory strikes and the trial court ruled on same. As such, petitioner can not now complain that the trial court failed to require respondent to prove a prima facie case of discrimination. *Id.* This

issue is without constitutional or jurisprudential merit and petitioner's writ must be denied based on same.

STEP TWO

Petitioner next contends that the trial court unreasonably applied *Batson*'s Step Two in denying his attempted peremptory strike of Mr. Anderson. Specifically, he complains that Mr. Anderson's responses to questions regarding the death penalty revealed a predisposition to imposing same. Based thereon, he complains that the trial court erred in finding that petitioner's stated rationale of his perception of Mr. Anderson's views on the death penalty and for peremptorily striking Mr. Anderson was racially motivated. Petitioner then appears to rationalize his actions in exercising the peremptory strike by contending that " . . . no lawyer in his right mind could have thought that he could keep whites from serving on the jury or even from constituting the vast majority of the jury.", and "Elementary mathematical principles would reveal to even the most simple-minded lawyer that he must select among jurors on some basis other than race with a jury pool that is 82.5% white."

Respondent would assert that if petitioner is truely contending that the trial court erred in its finding that his peremptory strike of Mr. Anderson was based on a prospective juror's views of the death penalty, his argument should revolve about testimony eliciting that point. It should not revolve about the

statistical racial makeup of the jury venire as set forth by petitioner herein. For to do so as petitioner herein merely confirms that petitioner's peremptory strike of Mr. Anderson was racially motivated. This claim is without constitutional or jurisprudential merit. Petitioner's writ must be denied.

STEP THREE

Petitioner contends herein that the trial court eliminated *Batson*'s Step Three by failing to determine whether respondent had carried its burden of proving purposeful discrimination. Specifically, citing the trial court's rationale for finding that petitioner had failed to state a race-neutral reason for attempting to peremptorily strike Mr. Anderson, he complains that at no point did the State provide a reason for believing that petitioner's exercising of its peremptory strike was based on race. *Batson*'s Step Three requires that the trial court determine whether the objector has carried his burden of proving purposeful discrimination. *Batson v. Kentucky*, supra at 98, 106 S.Ct. 1712; and *Miller-El v. Dretke*, 545 U.S. 231, 251-52, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005). This step involves evaluating "the persuasiveness of the justification" proffered by the exceptor, but "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." *Purkett v. Elem*, 514 U.S. 765, 768, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995). In determining whether purposeful discrimination has occurred, the court may consider a number of factors, including

(1) the percentage of racially recognizable potential jurors who were challenged by the *Batson* objector with a peremptory strike; (2) comparison of the racially recognizable potential panelists who were struck with African-American panelists allowed to serve; (3) the *Batson* objector's use of procedural mechanisms to move the racially recognizable panelists to the back of the panel, where they are less likely to serve; (4) evidence of a contrast between questions posed to black and non-black panelists where such contrast indicates intent to load questions to make a case to exclude the racially recognizable panelists; and (5) evidence of a systematic policy or practice within the exceptor's office of excluding a racially recognizable group of jurors. See *United States v. Nelson*, 450 F.3d 1201, 1207-08 (10th Cir. 2006) (citing *Miller-El v. Dretke*, 545 U.S. 231 (2005)).

Herein, the record reflects that petitioner sought through his voir dire questioning of white jurors to elicit evidence of their predisposition not only towards the death penalty, but towards African-Americans in general. He did not however seek to elicit that same predisposition from the African-American panelists. The record further reflects that petitioner peremptorily challenged white panelists exclusively. Moreover, it further reflects that of the fifteen African-American panelists, both parties stipulated to the exclusion of two for cause. Of the remaining thirteen, one African-American was excused by the trial court and two were selected to serve. Of the

remaining ten African-American panelists, petitioner failed to challenge a single one of those for cause. While the trial court did not specifically enumerate those considerations it made in concluding petitioner's purposeful discrimination, respondent would assert that it certainly considered same based on petitioner's voir dire actions. Petitioner's claim is without constitutional or jurisprudential merit.

JUROR'S OR COUNSEL'S DEMEANOR

Petitioner next attempts to preclude any possibility of the trial court's findings of fact to be based on its reliance of either Mr. Anderson's or petitioner's trial counsel's demeanor. Admitting that his reliance is on the cold record, he seeks to preclude demeanor as a possible rationale for the trial court's findings.

It is well settled that a *Batson* issue is a question of fact. *Hernandez v. New York*, 500 U.S. 352, 364, 369 (1991). A state court's answer to "'the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal,'" because such a finding largely turns on the court's "evaluation of the prosecutor's credibility." *United States v. Sneed*, 34 F.3d 1570, 1579 (10th Cir. 1994) (quoting *Hernandez*, 500 U.S. at 364); accord *Rice v. Collins*, 546 U.S. 333, 338 (2006) (citing *Purkett*, 514 U.S. at 768). Accordingly, the state court's factual findings are presumed to be sound

unless petitioner rebuts the presumption of correctness by clear and convincing evidence.

In brief, petitioner has failed to adduce a single fact which would rebut the trial court's findings by clear and convincing evidence. Rather, he attempts to besmirch an African-American trial judge's factual findings based on petitioner's view of the facts. This perception is further buttressed by petitioner's subsequent attempt to contend that the trial court's findings herein are merely a continuation of the trial court's discriminatory practice in previous jury selections in the Twenty-third Judicial District. Without a scintilla of fact that in any of the mentioned cases over which this particular trial judge has presided, he claims that petitioner's alleged claims are in fact true. He attempts to smear what has been a distinguished judicial career, claiming that it is a pattern of discriminatory practice. He further seems to allege that both the former District Attorney Falterman and the trial prosecutor herein are part of that discriminatory process. Respondent would assert that absent any clear and convincing evidence to substantiate his claim, petitioner's allegations are neither pertinent to nor necessary for the resolution of the instant case.

HERNANDEZ v. NEW YORK

Petitioner next contends that the ruling of *Hernandez v. New York*, supra, is distinguishable from the instant case. Same is based on his perception that the trial court shifted the burden to petitioner to

show that his peremptory strike was not racially motivated. For all of those reasons set forth above, petitioner's reasoning is without merit, the trial court not having shifted the burden to petitioner but petitioner having failed to permit the trial court to perform its duty by requiring respondent to prove a prima facie case of discrimination. Rather, petitioner immediately commenced giving his alleged race-neutral rationale for exercising the peremptory strike and the trial court ruling on same. This contention is without constitutional or jurisprudential merit.

CONSTITUTIONAL VIOLATION

Petitioner lastly concludes that merely by the seating of a white juror, petitioner's constitutional rights were violated because he could possibly have seated a juror of his ethnic background. This verbiage alone clearly indicates petitioner's proclivity to exclude white jurors from petitioner's venire. This philosophy permeates petitioner's final argument in that it appears that he seems to be proposing that African-Americans should have an unfettered right to exclude whites from jury venires based on the logic first set forth in *Swain v. Alabama*, 380 U.S. 202 (1965) and *Batson v. Kentucky*, supra.

Indeed, our Declaration of Independence provides in part that " . . . all men are created equal, that they are endowed with unalienable rights . . . ". On August 28, 1963, Dr. Martin Luther King extolled those

principles when he noted in his speech in Washington:

> "I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character."

Petitioner appears herein to extoll that we should go back to an era which should be long gone in our history. Mr. Anderson should not be judged by the color of his skin as petitioner would have but by the content of his character. Petitioner herein has failed to adduce a scintilla of fact to substantiate that Mr. Anderson could or would not provide to petitioner any and all of his Constitutional Rights when he was tried for the murders of Lisa Ann Dupuis and Jacqueline Guillot Blanchard. Petitioner's application for writ of certiorari must be denied.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that this court deny petitioner's application for writ of certiorari.

Respectfully submitted,

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